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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1974

NO. 74-

JOHN MARTIN CONNOR ..... *Petitioner*

vs.

TERRELL D. HUTTO ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES E. DAVIS
711 Pecan Street
Texarkana, Arkansas 75501

Attorney for Petitioner

TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

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Petitioner, John Martin Connor, respectfully prays that a Writ of Certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Eighth Circuit which was rendered on this proceeding on May 25, 1975.

OPINION BELOW

The Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit appears in the Appendix to this petition. The Opinion is reported at 516 F. 2d 853

(8 Cir. 1975). There is no reported Opinion of the United States District Court for the Eastern District of Arkansas.

JURISDICTION

Petitioner brought this action in the United States District Court for the Eastern District of Arkansas, invoking jurisdiction under 28 U.S.C. 2254 and 28 U.S.C. 2281. The judgment of the United States Court of Appeals was entered on May 28, 1975. This petition for writ of ceritorari was filed within 90 days of May 28, 1975. The Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether the dismissal of a direct State criminal appeal by the United States Supreme Court for want of substantial federal question is an actual adjudication for purposes of 28 U.S.C. Section 2244(c), that precludes subsequent federal habeas corpus.

Whether such a dismissal constitutes a finding of insubstantiality that is binding on lower federal courts for purposes of three-judge consideration under 28 U.S.C., Section 2281.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C., Section 2244(c) provides:

> "In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclu-

sive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

28 U.S.C., Section 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation, or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title."

STATEMENT OF THE CASE

On May 4, 1972, an information was filed in the Circuit Court of Miller County, Arkansas charging appellant with the crime of sodomy. This information accused appellant of placing the sexual organ of another male in his mouth.

On May 22, 1972, appellant appealed for arraignment and moved the Trial Court to quash the information upon the grounds that the conduct alleged did not violate any penal statute, and that if a statute was applicable it was unconstitutionally vague. This motion was overruled by the Trial Court. On June 5, 1972, appellant filed a motion to dismiss the information asserting that Ark. Stat. 41-813 did not apply, that the statute was unconstitutionally vague, and that the statute was repugnant to the United States Constitution, Amendments One, Nine, and Fourteen. This motion was overruled by the Court upon the overruling of appellant's demurrer to the information. On June 9, 1972, the Trial Court sentenced appellant to a general sentence of three years in the Arkansas Department of Corrections.

Before the Supreme Court of Arkansas appellant argued: 1) No Arkansas Statute exists which provides oralism to be a public offense. To construe Ark. Stat. 41-813 to include oralism is beyond the constitutional power of this Court, 2) Ark. Stat. 41-813 is vague and overbroad and thus denies rights secured to appellant by the Sixth and Fourteenth Amendments to the United States Constitution, 3) Ark. Stat. 41-813 establishes a religion and invades the right of privacy secured to appellant by the First, Ninth and Fourteenth Amendments to the United States Constitution. Seven days after this case was argued in the Arkansas Supreme Court, the Supreme Court of the United States delivered its opinions in *Roe v. Wade*, 41 U.S. L.W., 4213 (1973) and *Doe v. Bolton*, 41 U.S.L.W. 4233 (1973). Appellant timely filed a petition for rehearing conforming to that Court's rules which urged that the decisions in *Roe* and *Doe* were directly applicable to the constitutionality of Ark. Stat. 41-813. Appellant further argued that in ruling that fellatio came within the scope of

"sodomy," the Court had judicially enlarged the range of conduct prohibited by Ark. Stat. 41-813.

The facts out of which this case began are as follows: During the night of April 27, 1972, appellant and Pat Garrett were parked in appellant's automobile on the side of a county road north of Interstate Highway 30 in Miller County, Arkansas. Appellant is thirty years of age. Garrett's age was fourteen. Appellant and Garrett engaged consensually in the act of fellatio. A police officer patrolling the area detained both appellant and Garrett. He summoned Miller County sheriff's deputies to the scene who placed both appellant and Garrett under arrest.

The conduct complained of was consensual. The location of the conduct could be fairly characterized as quasi-public.

In May of 1973, Plaintiff docketed an appeal of this conviction in the United States Supreme Court. On January 7, 1974, the decision of the United States Supreme Court dismissing the appeal for want of substantial federal question became final. Plaintiff subsequently filed suit in the United States District Court for the Eastern District of Arkansas under Title 28 U.S.C., Section 2254 and Title 28 U.S. Code, Section 2281, seeking an order from the District Court voiding the conviction. The United States District Court entered an Order dismissing this petition on June 18, 1974; from this order of dismissal an appeal was taken to the United States Court of Appeals for the Eighth Circuit which rendered judgment adverse to the petitioner on May 28, 1975, holding that the dismissal of the direct appeal was an actual adjudication under 28 U.S.C., Section 2244(c), and that the constitutional claims of petitioner were branded as insubstantial by the United States Supreme

Court for purposes of an action under 28 U.S.C., 2281. The petitioner was released from the Cummins Unit of the Arkansas Department of Corrections on parole, but is at this time under the custody of the Defendant Terrell D. Hutto.

REASONS FOR GRANTING THE WRIT

1. The United States Supreme Court should decide for the interest of its supervisory powers over lower federal courts and for the purpose of a standard interpretation of 28 U.S.C. 2244(c) whether the dismissal of an appeal for want of a substantial federal question is an actual adjudication as those terms are intended in 28 U.S.C. 2244(c). The Supreme Court of the United States is best equipped to interpret the meaning of its own rules and to educate the lower federal courts with regard to the meaning of its practices.

At the outset it should be noted that to petitioner's knowledge, the United States Supreme Court has not yet ruled that a dismissal of an appeal for want of a substantial federal question is not a decision on the merits. This was pointed out in *U.S. Ex rel Epton v. Nenna*, 318 F. Supp. 899 (SDNY, 1970). In *Epton*, the petitioner had previously been convicted in New York State Courts of violation of the Criminal anarchy law. His appeal in the New York State Courts was decided against him and he filed not only an appeal, but a petition for writ of certiorari in the United States Supreme Court. Certiorari was denied and the appeal dismissed for want of a substantial federal question. The District Court held:

> "The majority, without opinion, dismissed the appeal 'for want of a substantial federal question.'

> That was, for purposes of the appealable question, a disposition 'on the merits' sufficient to conclude the subject for this court. The phrase 'on the merits' is in quotation marks here to flag its ambiguity, but either of its possible meaning in context leads to the same result for us at the present juncture: 1) The Supreme Court, though we are entitled to find this improbable, may have considered the substantive issues attending the anarchy statute and decided them summarily against petitioner. That would be the most obvious bar to reconsideration here."

The Court in a footnote pointed up the unresolved controversy regarding whether the dismissal of an appeal must be viewed as a decision on the merits.

> "There is lively disagreement among respected constitutional scholars concerning the significance of the Supreme Court's dismissal of an appeal. Some argue that since Congress has obliged the Court to hear certain appeals, 28 U.S.C. §1257, the dismissal of such appeals must be viewed as decisions on the merits. See Wechsler, Toward Neutral Principles of Constitutional Law, In Wechsler, Principles, Politics and Fundamental Law 3, 13-15, 47 (1961); Gunther, The Subtle Vices of the 'Passive Virtues,' 64 Col. L. Rev. 1, 10-13 (1964); Hart & Wechsler, The Federal Courts and the Federal System 574-76 (1953); Hart, Foreword: The Time Chart of the Justices, 73 Harv. L.R. 84, 89n. 13 (1959). Others, portraying and justifying a more politically 'flexible' Court, have tried to demonstrate that appeals are often 'dismissals for want of a convenient, or timely or

> suitable presented question' for resolution by the country's highest Court. Bickel, The Least Dangerous Branch 126-127. See also, id. at 71, 132 278n 25 & 26; Deutsch, Neutrality, Legitimacy, and the Supreme Court, 20 Stan. L.R. 169, 198-206, 213-249 (1968); M. Shapiro, Law and Politics in the Supreme Court (1964). The latter view, if accepted, might suggest that a district court could hear on habeas issues the Supreme Court has dismissed on direct appeal, just as it hears those raised in certiorari petitions which are denied.
>
> For the time being, at least, the debate must be among scholars. Until the Supreme Court explicitly tells us otherwise, the lower courts must assume that the obligatory jurisdiction, a matter given to Congress to control, is being exercised in accordance with what appears to be the literal statutory mandate."

This decision was affirmed by the United States Court of Appeals for the Second Circuit in *U.S. Ex rel Epton v. Nenna*, 446 F. 2d 363 (2 Cir. 1971). The Court in ruling the District Judge to be correct stated as follows:

> "These questions are very substantial, but we do not believe that we are free to rule on them in this case. The district court reasoned that the Supreme Court had either decided them or had held that they should not be reached and that this was binding on a lower court under the doctrine of law of the case."

Subsequent to these rulings, the United States Supreme Court issued its Opinion in *Biggers v. Neal*, 409 U.S. 188 (1972). *Biggers* involved the question whether a petition

for habeas corpus would lie when the United States Supreme Court had previously affirmed the appeal of the State Court conviction by virtue of a divided vote. In discussing the legislative history of 28 U.S.C. §2244, the Court stated: "This sub-section embodies a recognition that if this Court has 'actually judicated a claim on direct appeal or certiorari, a State prisoner has had the Federal redetermination to which he is entitled.' "

In *U.S. ex rel Radich v. Criminal Court,* 459 F. 2d 745 (2 Cir. 1972), the Court held that habeas corpus relief was not precluded by an affirmance of an appeal to the United States Supreme Court by virtue of equal division of Justices. The Court stated:

> "The writ's objective as embodied in the Constitution and the Judiciary Act, is to assure that when a person is detained unlawfully or in violation of his Constitutional rights, he will be afforded an independent determination by a federal court of the legality of his detention, even though the issue may already have been decided on the merits by a state tribunal.
>
> We have recited the foregoing background to shed light on the Congressional purpose behind §2244 (c). As we view it, Congress in enacting that supplement to the statute, did not intend it to deprive the habeas petitioner of his time-honored right to one federal adjudication on the merits merely because the constitutional issues had been *raised* in a prior proceeding before the Supreme Court. Only if the Supreme Court had actually *decided* the issues would its adjudication be final."

It should be noted that the process of invoking U.S. Supreme Court jurisdiction by appeal has changed appreciably during the last 70 years. In *Zucht v. King*, 260 U.S. 174, the Court dismissed an attack of a compulsory vaccination statute saying: "Although the validity of a law was formerly drawn in question, it is our duty to decline jurisdiction whenever it appears that the Constitutional question presented is not . . . substantial in character." In this particular proceeding, the Court had previously sustained the Constitutionality of such a statute. In 1928, Rule 12 of the Supreme Court was adopted which was intended to embody the principles set out in the *Zucht* case, whereby the Court could find jurisdiction lacking if the question presented was not one of substance, either frivolous or already settled." In the business of the Supreme Court at October Term, 1929, Frankfurter and Landis 44 Harv. L. Rev. 1 (1930), the authors stated:

> "Plainly, the criterion of substantiality is neither rigid nor narrow. The play of discretion is inevitable, and wherever discretion is operative in the work of the Court the pressure of its docket is bound to sway its exercise. To the extent that there are reasonable differences of opinion or the conclusiveness of prior rulings, the administration of Rule 12 operates to subject the obligatory jurisdiction of the Court to discretionary considerations not unlike those governing certiorari."

In his dissent in *Linehan v. Waterfront Commission*, 347 U.S. 439, Mr. Justice Douglas stated:

> "This case illustrates what I fear is a growing practice of the Court of diluting the Act of Con-

> gress which gives us jurisdiction of appeals. 28 U.S.C. §1253, et al. The Congress carved out a group of cases of which this is one, that comes here of a right and is not dependent, as are petitions for certiorari on a vote of four Justices out of nine for an adjudication by the Court on the merits of the controversy. In recent years the Court has more and more dismissed or affirmed appeals, with no opportunity of counsel to make oral argument and without any opinion by the Court."

That appellate jurisdiction of the United States Supreme Court is becoming more like its discretionary certiorari jurisdiction is evidenced by subsquent change in the Enactment of Rule 15 (1)(f)(g). This Rule requires that when a jurisdictional statement is presented to the United States Supreme Court, it must state "the grounds for believing the questions to be substantial enough for the Court to hear oral argument. Stern and Gressman in their work on *Supreme Court Practice*, 3rd Edition (1962), conclude from this history as follows:

> "This means that the Jurisdictional Statement now performs a function similar to that of the petition for certiorari. Its purpose is to induce the Court not to dispose of the case summarily but to hear it orally. In the language of Rule 15, the appellant should set forth 'the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.' "

In *Jordan v. Weaver*, 472 F. 2d 985 (7 Cir. 1973), the Court held: "A summary affirmance was a decision on the merits having precedential value." This decision was re-

versed by the United States Supreme Court in *Edelman v. Jordan*, 415 U.S. 651 (1974), in which the Court stated:

> "This case, therefore, is the first opportunity the Court has taken to fully explore . . . (the issue) in a written opinion . . . (these summary decisions) are not of the same precedential value as would be an opinion of this Court. . . . Since we deal with a Constitutional question, we are less constrained by the principles of stare decisis than we are in other areas of law. Having now had the opportunity to more fully consider the . . . issue after briefing and argument, we disapprove . . . of our previous summary decisions."

The history of Rule 15 (1) (f) (g) plus the considerations enunciated in *Biggers, Radich* and *Jordan* should apply to this case. Certainly the dismissal of an appeal for want of a substantial federal question is more akin to a denial of certiorari than it is to an affirmance by a divided opinion. At least when the Court affirms because of a divided opinion, there have been briefs and arguments on the merits. Further, it would seem that there is no precedential value to a dismissal for want of a substantial federal question. Such a ruling simply leaves undisturbed the ruling of the State Supreme Court.

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2. The Supreme Court should decide whether consideration motivating the exercise of jurisdiction under 28 U.S.C. §1257(2) are the same as those considerations required for the convening of a three-judge court under 22 U.S.C. §1981. Petitioner respectfully urges that the lack of a substantial federal question for purposes of appeal to the Supreme Court differs from the test in substantiality that

is applied to a claim where jurisdiction is invoked under 28 U.S.C. §1981.

In *Goosby v. Osser*, 409 U.S. 512 (1973), the United States Supreme Court reversed a dismissal of an application under §2281 and stated the following criterion for determining the substantiality of the Constitutional claim involved:

> "Title 28 U.S.C. §2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.' The limiting word 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of the court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' " (Citations omitted).

Because of the ruling in *Goosby*, Petitioner submits that the tests for insubstantiality under §2281 differ from what is substantial as far as invoking the plenary consideration of the United States Supreme Court on a direct

appeal. Reference is again made to those matters stated above regarding the influence of docket control upon the exercise of plenary consideration by the Supreme Court. Further, it should be noted that the Court in *Goosby* does not support its description of what constitutes an insubstantial Constitutional attack by resorting to decisions as *Zucht v. King*, Supra, which deals with appeals that lack a substantial question. It would appear that there are two different criteria in operation and that a federal question which lacks substantiality for purposes of plenary consideration on appeal may not be insubstantial for purposes of treatment under §2281.

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3. Recent decisions in other federal courts of appeals have taken the position enunciated in *U. S. ex rel Upton v. Nenna*, 446 F. 2d 363 (2 Cir. 1971) and have thus held that even though a Constitutional claim may seem important that it cannot decide the claim on its merits. Examples are: *Howell v. Jones*, 516 F. 2d 53 (5 Cir. 1975); *Wright v. City of Jackson*, 506 F. 2d 900 (5 Cir. 1975). Petitioner respectfully suggests that the Courts of appeal are reluctant to speculate regarding what the effect of dismissal for want of substantial federal question is, without the United States Supreme Court's first saying whether it is an adjudication on the merits for the purpose of §2244(c) or §1981. The interpretation of the rules and practices of this Court is in a sense solely within the province of the United States Supreme Court and the Court should recognize that there is a need in the Circuit courts for a ruling from this Court stating exactly what the effect of a dismissal of an appeal for want of a substantial federal question means in terms of further litigating those issues raised in the jurisdictional statement.

CONCLUSION

The Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit. On plenary consideration the judgment should be reversed and the cause remanded for a consideration of petitioner's constitutional claims.

Respectfully submitted,

JAMES E. DAVIS
711 Pecan Street
Texarkana, Arkansas 75501

Attorney for Petitioner

PROOF OF SERVICE

I certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable Jim Guy Tucker, Attorney General, Justice Building, Little Rock, Arkansas 72201, this the 21st day of August, 1975, by depositing a copy of said Petition in the United States Mail with first class postage prepaid, and that all parties required to be served with a copy of this Petition have been served.

/s/ JAMES E. DAVIS

Appendix

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 74-1570

JOHN MARTIN CONNOR, *Appellant* v. TERRELL D. HUTTO, ET AL, *Appellees*	Appeal from the United States District Court for the Eastern District of Arkansas

Submitted: January 6, 1975

Filed: May 28, 1975

Before JOHNSEN, Senior Circuit Judge, STEPHENSON and WEBSTER, Circuit Judges.

STEPHENSON, Circuit Judge.

This appeal concerns the precedential effect of a dismissal of a direct state criminal appeal by the United States Supreme Court for want of a substantial federal question.[1] We hold that such a dismissal is an actual adjudication for purposes of 28 U.S.C. §2244(c) that precludes subsequent federal habeas corpus relief. We further hold that such a dismissal constitutes a finding of insubstantiality that is, absent subsequent doctrinal developments to the contrary by the Supreme Court, binding on lower federal courts for

[1]See Supreme Court Rule 16(1)(B).

purposes of three-judge court consideration under 28 U.S.C. §2281. Accordingly, we affirm.

Appellant Connor was convicted in Arkansas state court of violating the sodomy statute, Ark. Stat. Ann. §41-813 (Repl. 1964).[2]

Prior to his trial, Connor moved to dismiss the information filed against him on the ground that the statute was unconstitutionally vague and that it violated his First, Ninth and Fourteenth Amendment rights under the Constitution. Following his conviction and the imposition of a three-year sentence, Connor urged the same grounds to the Arkansas Supreme Court and further argued that the act for which he was charged, namely, fellatio, was not in fact prohibited by any Arkansas statute. That court confirmed his conviction in *Connor v. State*, 490 S.W. 2d 114 (Ark. 1973). On direct appeal to the United States Supreme Court pursuant to 28 U.S.C. §1257, the case was dismissed for want of a substantial federal question. *Connor v. Arkansas*, 94 S. Ct. 342, rehearing denied, 94 S. Ct. 884 (1973).

Subsequent to that dismissal, appellant Connor filed suit in federal district court seeking to enjoin the State of Arkansas from incarcerating him as a result of his sodomy conviction. Connor also asked that a three-judge panel be convened pursuant to 28 U.S.C. §2281 for the purpose of determining the constitutionality of the Arkansas sodomy statute. In an amendment to this complaint, Connor added a claim seeking a writ of habeas corpus pursuant to 28 U.S.C. §2254 and a declaration that his conviction was void. In a memorandum and order dated June 17, 1974, the dis-

[2] 41-813. Sodomy or buggery — Penalty. — Every person convicted of sodomy, or buggery shall be imprisoned in the penitentiary for a period not less than one (1) nor more than twenty-one (21) years.

trict court[3] dismissed appellant's complaint for lack of jurisdiction. This appeal followed.

Appellant initially contends here that the district court erred in dismissing his claim for habeas corpus relief under §2254. He claims that a dismissal for want of a substantial federal question by the Supreme Court is not an actual adjudication of the merits of his case for purposes of §2244 (c) that precludes relitigation of those issues under §2254. We disagree.

The Second Circuit, in *United States ex rel Epton v. Nenna*, 446 F. 2d 363 (2d Cir. 1971), considered the effect of such a dismissal by the Supreme Court and concluded that it was "a decision on the merits of those issues raised on appeal" and thus was binding on the federal court in a subsequent habeas proceeding involving the same constitutional claims. *Id.* at 366 (footnotes omitted). See *Ohio ex rel Eaton v. Price*, 360 U.S. 246 (1959) (Brennan, J.); *Ahern v. Murphy*, 457 F. 2d 363 (7th Cir. 1972). See *Smith v. Slayton*, 369 F. Supp. 1213, 1215-16 (W.D. Va. 1973). These cases are dispositive here. Since the issues Connor raised in his habeas corpus petition were previously considered by the Supreme Court and found to be constitutionally insubstantial, the district court properly dismissed his petition.[4]

[3]The Honorable Oren Harris, United States District Judge for the Eastern District of Arkansas.

[4]We also reject appellant's contention that the rationale from **Neil v. Biggers**, 409 U.S. 188 (1972), is applicable here. In **Biggers** the Court stated that an affirmance of a state supreme court conviction by an equally divided vote of the United States Supreme Court would not bar a subsequent petition for habeas corpus relief. The Court carefully pointed out that such an affirmance merely represented that a majority of the Court could not reach any agreement on the issues of law presented in the case. 409 U.S. at 191-92. Conversely, a dismissal for want of a substantial federal question represents that a majority of the Court has agreed that the issues in the case are insubstantial. See **Ohio ex rel Eaton v. Price**, 360 U.S. 246 (1959) (Brennan, J.).

Appellant also urges that the district court erred in dismissing his attempt to have the constitutionality of the Arkansas sodomy statute determined by a three-judge court. We hold that appellant's request for the convening of a three-judge court was properly denied.

Under 28 U.S.C. §2281 a single judge must determine whether the federal constitutional claims are substantial ones that justify convening a three-judge panel. *Potter v. Meier*, 458 F. 2d 585 (8th Cir. 1972). In the instant case the district court found correctly that the Supreme Court's dismissal of appellant's appeal for want of a substantial federal question constituted a finding of insubstantiality that was controlling for purposes of §2281. *Heaney v. Allen*, 425 F. 2d 869 (2d Cir. 1970).

The *Heaney* case also involved an attempt to convene a three-judge court following a Supreme Court dismissal for want of a substantial federal question. In discussing the effect of that dismissal, the Second Circuit noted that:

> We continue to hold our considered position that "unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise." *Port Authority Bondholders Protective Committee v. Port of New York Authority*, 387 F. 2d 259, 263 & n. 3 (1967).

See also California Water Service Co. v. City of Redding, 304 U.S. 252, 255 (1938); *Johnson v. New York State Education Dept.*, 449 F. 2d 871, 874-80 (2d Cir. 1971).

There are no such subsequent doctrinal developments involving the constitutionality of sodomy statutes that alter

the effect of the Supreme Court's dismissal in this case. The "right of privacy" rationale stressed by appellant has not been extended by the Court to include the right to engage in the conduct for which appellant was convicted here, namely, sodomy in a car parked on a public highway. *Cf. Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-67 (1973). Nor has the Court held to be unconstitutionally vague a sodomy statute such as Ark. Stat. Ann. §41-813, which flatly prohibits "sodomy" and "buggery." The conduct for which Connor was convicted has long been held to violate this statute. *Carter v. State*, 500 S.W. 2d 368 (Ark. 1973); *Mangrum v. State*, 299 S.W. 2d 80 (Ark. 1957); *Havens v. State*, 228 S.W. 2d 1003 (Ark. 1950). Thus, since appellant was on clear notice that his conduct was prohibited under the Arkansas sodomy statute, his attempt to have the law voided on ground of constitutional vagueness is without merit. *See Wainwright v. Stone*, 414 U.S. 21 (1973).

Having found no subsequent doctrinal developments that suggest a change in the Supreme Court's approach to the issues involved herein, we hold that the dismissal of Connor's direct appeal acted to "inescapably render the claims frivolous" and bar the convening of a three-judge court. *Goosby v. Osser*, 409 U.S. 512, 518 (1973). *See also Pordum v. Board of Regents*, 491 F. 2d 1281 (2d Cir. 1974).

Affirmed.

A true copy.

Attest:

CLERK, U. S. Court of Appeals, Eighth Circuit

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-

JOHN MARTIN CONNOR ..... *Petitioner*

vs.

TERRELL DON HUTTO ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals in *Connor* v. *Hutto*, appears at 516 F. 2d 853, and is attached in the Appendix to petitioner's brief.

JURISDICTION

Respondent accepts petitioner's jurisdictional statement as accurate.

QUESTIONS PRESENTED

I. The dismissal of a direct state criminal appeal by the United States Supreme Court for want of a substantial federal question is an actual adjudication for purposes of 28 U.S.C. §

2244 (c) and precludes subsequent federal habeas corpus.

II. The dismissal of a direct state criminal appeal by the United States Supreme Court for want of a substantial federal question constitutes a finding of insubstantiality that is binding on lower federal courts for purposes of consideration by a three judge panel pursuant to 28 U.S.C. § 2281.

STATUES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2244 (c) and 28 U.S.C. § 2281:

STATEMENT

Respondent accepts petitioner's statement of the case.

ARGUMENT

I

THE DISMISSAL OF A DIRECT STATE CRIMINAL APPEAL BY THE UNITED STATES SUPREME COURT FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION IS AN ACTUAL ADJUDICATION FOR PURPOSES OF 28 U.S.C. § 2244 (c) AND PRECLUDES SUBSEQUENT FEDERAL HABEAS CORPUS.

Petitioner's state conviction was appealed to the United States Supreme Court and affirmed for want of a substantial federal question. *Connors* v. *State of Arkansas*, — U.S. —, 94 S.Ct. 884 (1973). The Federal District Court in which this

habeas action was brought considered that decision binding and Connors appealed to the Eighth Circuit seeking reversal of that order. The Eighth Circuit affirmed the district court at 516 F. 2d 853 (8th Cir. 1975); the decision appears at the appendix of petitioner's brief.

The effect of dismissing an appeal for want of a substantial federal question is determined by 28 U.S.C. § 2244 (c),

> ". . . A prior judgment of the Supreme Court of the United States on appeal or review by writ of certiorari at the instance of the prisoner of the decision of such state court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a federal right which constitutes grounds for discharge in a habeas corpus proceeding, actually adjudicated therein. . ."

Petitioner asks this court to determine whether the summary dismissal of a direct appeal for want of a substantial federal question is a final determination, such that the same issue may not be relitigated in a habeas corpus proceeding in the district court. Is a summary dismissal for want of a substantial federal question a decision on the merits such that the issue raised is "actually adjudicated therein".

As petitioner points out the court's that have addressed the problem assume that such a dismissal, as in the present case, is a dismissal on the merits.

> "Until the Supreme Court explicitly tells us otherwise, the lower courts must assume that the obligatory jurisdiction, a matter given to congress to con-

trol is being exercised in accordance with what appears to be the literal statutory mandate." ***U.S. Ex Rel Epton*** v. ***Nenna,*** 318 F. Supp. 899 n.8 (1970), affirmed, 446 F. 2d 363 (2nd Cir. 1971).

Simply because an opinion is not written, therefore rendering the decision of no analytical value as precedent, does not prevent the decision from being a final adjudication. The district in ***Epton*** v. ***Nenna,*** supra, properly considered such a dismissal as final until the United States Supreme Court indicates otherwise. One scholar has concluded—

> "There in little in theory and little in practice to suggest that summary affirmance, reversals, and dismissal for insubstantiality have ceased being decisions on the merits." Guther, The Subtle Vices of the "Passive Virtues", 60 Col. L. Rev. 1, 11 (1964).

Another legal writer has also touched upon the issue herein—

> "It must be assumed that the justices spend more time in studying jurisdictional statements on appeal than they do in studying petitions for writ of certiorari, engaged as they are in ***adjudicating*** rather than in exercising a statutory discretion whether to adjudicate." Hart, The Time Chart of the Justices, 73 Harv. L. Rev. 84, 89 (1959). (emphasis added).

Given the statutory mandate at 28 U.S.C. § 2244 supra, the Eighth Circuit and Second Circuit were correct in determining that the dismissal for want of a substantial federal question is a decision on the merits preventing further habeas consideration.

II

THE DISMISSAL OF A DIRECT STATE CRIMINAL APPEAL BY THE UNITED STATES SUPREME COURT FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION CONSTITUTES A FINDING OF INSUBSTANTIALITY THAT IS BINDING ON LOWER FEDERAL COURTS FOR PURPOSES OF CONSIDERATION BY A THREE JUDGE PANEL PURSUANT TO 28 U.S.C. § 2281.

In *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973), the United States Supreme Court recently held that—

> "In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281."

The instant case has been previously dismissed by the United States Supreme Court for insubstantiality in such a manner as to "inescapably render the claims frivolous", not simply of "doubtful or questionable merit".

Petitioner contends that substantiality under 28 U.S.C. § 2281 for purposes of convening a three judge panel is somehow different than substantiality for purposes of direct appeal to the United States Supreme Court. In *Heaney* v. *Allen*, 425 F. 2d 869 (2nd Cir. 1970) that court held that a question branded insubstantial on direct appeal to the United States Supreme

Court remains so except when doctrinaire developments indicate otherwise. As analyzed in the Eighth Circuit's opinion in the instant case, such doctrinaire developments have not appeared.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES GUY TUCKER, JR.
ATTORNEY GENERAL
STATE OF ARKANSAS

BY: JACK T. LASSITER
ASSISTANT ATTORNEY GENERAL
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201
Attorneys for Respondent